

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 232 of 2014

and

M.P.No. 1 of 2014

1.Palanisamy
2.Kundhiyammal
3.Saravanan

..Appellants/ Respondents/ Defendants

Vs.

1.Venkatachalam
2.Karthick
3.Kumar
4.Pappa

..Respondents/ Appellants/Plaintiff

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the decree and judgment dated 10.10.2013 in A.S.No. 17 of 2013 on the file of I Additional Sub-Ordinate Judge, Salem reversing the judgment and decree dated 28.06.2012 in O.S.No. 168 of 2010 on the file of Principal District Munsif, Salem.

For Appellants : Mr. P.Jagadeesan

For Respondents : Mr.J.Franklin

J U D G M E N T

The defendants in O.S.No. 168 of 2010, who were successful before the Trial Court in getting the suit for declaration and injunction laid by the plaintiffs dismissed have come forward with this appeal upon reversal of the judgment of the Trial Court by the lower Appellate Court in A.S.No. 17 of 2013.

2. The suit was filed by the respondents / plaintiffs seeking declaration of their right of way over 10 feet pathway on the Eastern side of the property of the defendants to reach his property, which is situate on the North.

3. According to the plaintiffs, the entire property measuring about 29 cents belonged to the father of the first plaintiff and the first defendant, Govinda Gounder. The said Govinda Gounder executed a settlement deeds settling various extents of properties on his four children namely, the 1st plaintiff, the first defendant, one Kannan and Chellaiya. The

Panchayat road is situate on the Southern extremity. Therefore, the plaintiff, who was allotted the Northern portion was given a right of way over the 10 feet pathway on the Eastern side of the property settled on the other three siblings. A perusal of the settlement deeds would show that except the settlement deed executed in favour of the plaintiff namely, Ex.A1 dated 28.04.1995 all the other three documents showed existence of a pathway on the Eastern side of the property and the Eastern boundary for all the three settlement deeds reads as follows:-

“என்னால் விடப்பட்டிருக்கும் 10 அடி பாதை மார்கமாக”

Therefore, according to the plaintiff, he is entitled to right of way over the said 10 feet pathway to reach his lands situate on the Northern side.

4. The suit was resisted by the defendants contending though the settlement deed refers to such a pathway, there is no such pathway on the Eastern side. The parties were using the land of one Chandra, which was situate on the Eastern side to reach their respective portions. The first defendant had also purchased the lands of the other brothers namely, Kannan and Chellaiah, which are situate on the South of the property allotted to him under the settlement deed Ex.B1.

5. It was further contended that the defendant had purchased the property on the South, which was allotted to Kannan to enable him to reach the Panchayat road on the further South. The defendant would further contend that the plaintiff as well as the defendant were using the property of one Chandra that is situate on the Eastern side to access their property. Since the property belonging to Chandra was purchased by a 3rd party, who put up a fence, the plaintiff has come forward with the present suit using the written recitals content in the settlement deeds.

6. The Trial Court upon a consideration of the evidence on record and the report of the Commissioner concluded that there was no pathway existing on the date of the Commissioner's receipt. The learned Trial Judge also taken note of the fact that P.W.1 in his evidence has deposed that he has been using the pathway in Chandra's land. The evidence of D.W.2 (Govinda Gounder), who deposed that he had mistakenly shown the pathway over Chandra's land as if it is in his land was also considered by the learned Trial Judge to conclude that the plaintiff does not get a right of way over the defendants portion of the land described by him. Aggrieved, the plaintiff filed an appeal in A.S.No. 17 of 2013.

7. The lower Appellate Court upon a reconsideration of the evidence held that the claim of the defendant that the suit

pathway was never in existence and that the recitals in the settlement deeds executed by Govinda Gounder on 28.04.1995 in favour of his children are false, cannot be accepted, since the defendant who had obtained the property under Ex.B1 dated 28.04.1995 cannot let in evidence against its contents, in view of the Section 92 of Evidence Act. The lower Appellate Court had also further found that even in the sale deed executed by Kannan in favour of defendant namely, Ex.B2 dated 21.03.1999, the suit pathway is shown as a 10 feet wide pathway on the eastern side. Taking note of the above documentary evidence, the learned Sub-Ordinate Judge concluded that the plaintiff is entitled to right over the 10 feet pathway that was left by Govinda Gounder, while settling the property on his sons, situate on the eastern side of the property of the defendant as well as Kannan. On the aforesaid conclusions, the lower Appellate Court reversed the judgment of the Trial Court and decreed the suit as prayed for. Aggrieved, the defendants have come forward with this second appeal.

8. The following questions were framed at the time of the admission:-

"i) Whether the plaintiffs are entitled to get a decree as prayed for, in the absence of any proof of title or possession of the alleged suit pathway? Whether the plaintiffs discharged their burden of proof of their title and possession over the alleged suit pathway?

ii) In the light of the specific observations of the Advocate Commissioner in Ex.C1 and C2, which was virtually admitted by P.W.1 and not chosen to file any objection filed to the said report, whether lower Appellate Court right in holding that the plaintiffs are entitled to get a decree in respect of the alleged pathway?

iii) In view of the specific admissions made by P.W.1 that the plaintiffs are using one Chandra's land as pathway. Whether the lower Appellate Court right in decreeing the suit?"

9. I have heard Mr.P.Jagadeesan, learned counsel appearing for the appellants and Mr.J.Franklin, learned counsel appearing for the respondents.

10. Mr.P.Jagadeesan, learned counsel appearing for the appellants while elaborating on the question of law would submit that in the light of the Commissioner's report and plan, which show that the suit pathway was not in existence, coupled with the evidence of D.W.2 (author of the settlement deed 28.04.1995). The lower Appellate Court was wrong in concluding

that the plaintiff as Co-sharer of the property has right to the pathway. The learned counsel would also draw my attention to the evidence of P.W.1 wherein, he had admitted that he has been using the pathway running on Chandra's land, which is situate on the East of the lands belonging to Govinda Gounder, who settled it under the settlement deed dated 28.04.1995 on his children.

11. Contending contra, Mr.J.Franklin, learned counsel appearing for the respondents would submit that the lower Appellate Court had rightly rejected the oral evidence of D.W.2, which is against the recitals in a written registered instrument. He would also point out that Section 92 of the Evidence Act bars oral evidence contradicting the terms of a written registered instrument. The learned counsel would also further contend that a perusal of the documents namely, Ex.A1 i.e., settlement deed in favour of the plaintiff, Ex.A3 settlement deed in favour of the defendant would show that Govinda Gounder while settling properties on his children had left 10 feet wide pathway in the Eastern side of the lands settled on the 1st defendant and Kannan. He would also rely upon the boundary recitals in the EX.A1 to show that Govinda Gounder himself retained certain lands of the Northern most portion, East and West of land settled on the plaintiff. These boundary recitals, according to the learned counsel probablise the case of the plaintiff that Govinda Gounder would have left a pathway measuring about 10 feet on the Eastern side to reach the Panchayat road on the South from the properties retained by him at least. I have heard the rival submissions.

12. It was not in dispute that Govinda Gounder, father of the 1st plaintiff and the 1st defendant had large extent of land and settled various extents on his children under settlement deeds dated 28.04.1995. The Panchayat road was situate on the Southern most end and the plaintiff was allotted to Northern most portion. The boundary descriptions in Ex.A1, settlement deed in favour of the 1st plaintiff would show that there is a East to West pathway on the South of the plaintiff's property. This East-West pathway was must have been left by Govinda Gounder only to reach the property retained by him on the Western side of the property settled on the plaintiff.

13. Curiously, Ex.B2(sale deed) executed by Kannan in favour of the defendant also recites that there is a North - South pathway on the Eastern side of the property sold by Kannan. These recitals in the documents very clearly demonstrate the existence of the pathway on the Eastern side of the property settled on the first defendant and Kannan and the other brother. Any evidence contrary to the recitals in the documents by the parties to the document is barred under Section 92 of the Evidence Act. It will be pertinent to point out at this

juncture, Govinda Gounder, who retained the lands on the Northern most portion would not have settled the properties in the South abutting the road without reserving himself a right of way. Though it is claim that the parties were using the land of the adjacent owner Chandra to reach their respective portions settled under the settlement deeds dated 24.08.1995, the said user by itself cannot denude the plaintiff of the right conferred on him under the settlement deed executed by his father in his favour.

14. The lower Appellate Court had rightly appreciated the evidence and therefore come to the conclusion that the oral evidence which runs contrary to the written instrument cannot be accepted. On the said findings, the lower Appellate Court reversed the judgment and decree of the Trial Court. The first question of law is answered to the effect that recitals in the settlement deeds namely, Ex.A1, A3 and B1 by itself established the existence of the pathway and the right of the plaintiff to use the pathway. Therefore, the question of No.1 is answered against the appellants. The Commissioner has filed a report setting out the physical features that were available on the date of the visit. The very fact that the Commissioner has stated that there was path in the land of Chandra situate on the East through which the plaintiff would be able to reach his property will not have the effect of taking away the right conferred under the registered instrument. The alleged admission of P.W.1 that he has been using Chandra's land cannot be put against him in as much as he has categorically stated that though I am using it the same is not the suit pathway. The mere user of another land to reach, the plaintiffs property will not deprive the plaintiff of his right which is conferred on him by express grant. Hence, questions of law No.2 and 3 are also answered against the appellants.

15. In view of the answers given to questions of law 1 to 3, the appeal fails and accordingly dismissed. Consequently, connected miscellaneous petition is closed. No costs.

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Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To,
The I Additional Sub-Ordinate Judge, Salem

2.The Principal District Munsif, Salem.

Copy to:
The Section Officer,
VR Section, High Court, Madras.

+lcc to Mr.P.Jagadeesan , Advocate SR.No. 83416

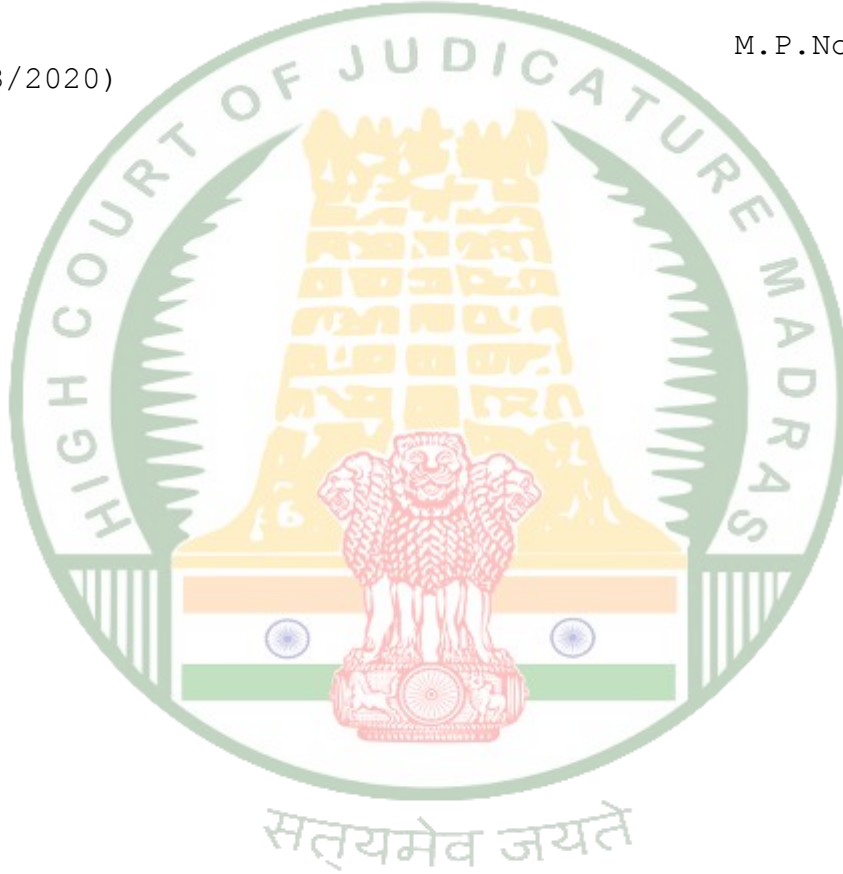
+lcc to Mr.J.Franklin , Advocate SR.No. 83508

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A.SK(18/03/2020)



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